

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of AQUATEL INDUSTRIES, )  
INC. )  
Under DGS Project No. ) Docket No. MSBCA 1192  
H-453-791-001 )

August 30, 1984

Responsibility - The experience of officials gained prior to the formation of a corporation or other business entity can be considered when evaluating responsibility.

Responsibility - Materials relating to the determination of a bidder's responsibility can be submitted by the bidder after bid opening.

Responsibility - A matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation.

Responsibility - Questions concerning a bidders qualifications and responsibility are for determination by the procurement officer with which this Board will not interfere in the absence of a showing of bad faith or lack of a reasonable basis therefore.

Responsibility - The fact that another conclusion is possible under a set of facts does not invalidate the procurement officer's determination of responsibility where the latter also is reasonable.

APPEARANCE FOR APPELLANT: Stanford H. Franklin, Esq.  
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APPEARANCE FOR RESPONDENT: Edward S. Harris  
Assistant Attorney General  
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OPINION BY MR. LEVY

This is an appeal from a Department of General Services' (DGS) procurement officer's final decision denying Appellant's protest of the award of the captioned contract to a competitor. Appellant maintains that the bid of Henry Brothers, Inc. (Henry Brothers), the apparent low bidder, should be rejected as nonresponsive since it failed to comply with the Invitation For Bids (IFB) in certain material respects. DGS, on the other hand, argues that Henry Brothers has complied and should be awarded the contract.

## Findings of Fact

1. DGS issued an IFB for Project No. H-453-791-001, Removal and Replacement of Asbestos Ceilings At The Deer's Head Center, Salisbury, Maryland, in March, 1984.

2. Section 01010, ¶1.06 of the IFB entitled "Experience Statement - Subcontractor For Asbestos Removal" provides as follows:

- A. Submit name and address of proposed subcontractor for asbestos removal. Include name and address of at least 3 purchasers of service, location of work performed, with record of air monitoring for asbestos as required by OSHA 1910.1001.
- B. Furnish written certification that employees have had instruction on the dangers of asbestos exposure, MOSH and EPA regulations, decontamination procedures and respirator use.
- C. Furnish evidence that the subcontractor for asbestos removal has met all requirements of the Department of Health and Mental Hygiene's regulations "License to Remove or Encapsulate Asbestos" COMAR 10.18.23.
- D. Failure to provide information on the above items will constitute a nonresponse, and the bid, in its entirety will not be considered.

3. Bids were opened on May 8, 1984. Henry Brothers' price of \$116,000 was the apparent low bid. Appellant's price of \$121,178 was the second low bid.

4. In its bid Henry Brothers identified Baltimore Asbestos Removal Co., Inc. (BARCO) as the subcontractor who would perform the asbestos removal phase of the contract work. BARCO is a new company which was incorporated in March, 1984. There is no indication that BARCO had performed asbestos removal work under its own name prior to bid opening on this project. However, BARCO's president, Bart Harrison, submitted with the Henry Brothers' bid the names of nineteen projects which he had supervised as an employee of another company, MARCOR, prior to forming BARCO.

5. Henry Brothers also submitted a copy of BARCO's "License For Asbestos Removal/Encapsulation" issued April 11, 1984 by the Maryland Department of Health and Mental Hygiene, pursuant to COMAR 10.18.23.

6. BARCO's letter of introduction signed by Mr. Harrison and attached to Henry Brothers' bid contained, in pertinent part, the following:

\* \* \*

We have the necessary experience, equipment and licenses required to to [sic] do a quality job removing asbestos which is performed in accordance to the State and Federal Laws and regulations.

I herewith state my written certification that all of our employees have received physicals and expert training on the dangers of asbestos exposure, decontamination procedures and respirator use.

\* \* \*

7. Henry Brothers did not submit with its bid BARCO's "record of air monitoring for asbestos as required by OSHA 1910.1001" for three projects. However, in response to DGS' request made after the bid opening, Henry Brothers provided this information on June 1, 1984, prior to the recommendation of award of the contract.

8. Appellant filed its protest with DGS on May 11, 1984 contending that Henry Brothers did not comply with the provisions of ¶1.06 of the IFB. Specifically, it challenged BARCO's list of experience projects and the omission of the prescribed air monitoring records. Based on this, Appellant thought there was ample justification to delcare Henry Brothers' bid nonresponsive pursuant to ¶1.06D.

9. Mr. Marshal McCord, the procurement officer, denied Appellant's protest in his final decision issued on June 1, 1984. He determined that it was proper for BARCO to utilize Mr. Harrison's previous work experience as a job foreman for MARCOR to satisfy the requirements of ¶1.06A. Further, he concluded Henry Brothers failure to submit air monitoring records with its bid was a minor irregularity that could be corrected under COMAR 21.06.02.03.

10. Appellant filed a timely notice of appeal with this Board on June 12, 1984.

#### Decision

Appellant initially argues that Henry Brothers' subcontractor, BARCO, cannot comply with the experience requirement of ¶1.06 of the IFB because it recently was incorporated and the records of the Maryland Air Management Administration reveal that BARCO had performed no asbestos removal work prior to the bid opening. Appellant further challenges the use of Mr. Harrison's past work experience with another company to satisfy this experience requirement.

The Comptroller General of the United States under comparable procurement laws and regulations has recognized on many occasions that the experience of corporate officials gained prior to the formation of a new corporation can be included when evaluating a corporation's overall experience level. Haughton Elevator Division, Reliance Electric Company, B-184865, 76-1 CPD ¶294, May 3, 1976, p. 9; Baldwin Ambulance Service, Inc., et al., B-184384, 75-2 CPD ¶392, December 15, 1975, p. 3; Hydromatics International Corporation, B-180669, 74-2 CPD ¶66, July 29, 1974, p. 3. Therefore, it was appropriate for the procurement officer here to utilize Mr. Harrison's recent work experience with another corporation in evaluating BARCO as a responsible subcontractor to perform the asbestos removal work.

A second preliminary issue raised by Appellant concerns whether the DGS procurement officer appropriately received and considered the air monitoring records submitted by Appellant after bid opening. In this regard,

we have consistently held that material relating to the determination of a bidder's responsibility can be submitted by the bidder after bid opening. It was clearly stated in Carpet Land, Inc., MSBCA 1093, January 19, 1983, at p. 5, as follows:

Information bearing on a prospective contractor's ability to perform in accordance with the contract terms and not on its legal obligation to perform the required services in exact conformity with the IFB specifications relates to responsibility. (citations omitted). As this Board previously has held, it is appropriate to receive and evaluate information, after bid opening, if it pertains to the determination of a bidder's responsibility. Track Materials, MSBCA 1097, November 30, 1982, p. 9; Maryland Supercrete Company, MSBCA 1079, October 14, 1982, p. 8.

Thus, Henry Brothers' submission, after bid opening, of BARCO's "record of air monitoring for asbestos as required by OSHA 1910.1001" was acceptable and the procurement officer was permitted to utilize this material to determine BARCO's responsibility.

In Appellant's May 11, 1984 letter of protest and at the hearing of this appeal, (Tr. pp. 13, 21, 36), it further was argued that the language of ¶1.06D of the IFB should be operative and the bid declared nonresponsive. However, it has been held that "a matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation." Haughton Elevator Division, Reliance Electric Company, B-184865, supra, at p. 8; see also Track Materials, MSBCA 1097, November 30, 1982, p. 7. The materials requested in the IFB ¶1.06A clearly relate to Appellant's ability to perform in accordance with the contract terms and thus relate to Appellant's responsibility.

Finally, Appellant contends that the DGS procurement officer acted unreasonably in determining Henry Brothers to be responsible. However, any question concerning ". . . a bidder's qualifications and responsibility is solely for determination by the contracting agency with which this [Board] will not interfere in the absence of a showing of bad faith or lack of a reasonable basis therefore." 38 Comp. Gen. 572, 578; KECO Industries, Inc., 203 Ct. Cl. 566, 576 (1974). In 39 Comp. Gen. 705 at p. 711 this basic rule is explained as follows:

. . . The projection of a bidder's ability to perform if awarded a contract is of necessity a matter of judgment. While such judgment should be based on fact and should be arrived at in good faith, it must properly be left largely to the sound administrative discretion of the contracting offices involved, since they are in the best position to assess responsibility, they must bear the major brunt of any difficulties experienced by reason of the contractor's lack of ability, and they must maintain the day to day relations with the contractor on behalf of the Government. For these reasons, it would be unreasonable to superimpose the judgment of our Office or <sup>other</sup> any agency or group on that of the contracting officials. . . .

At the hearing in this appeal, Appellant strenuously argued that no reasonable basis existed for the DGS procurement officer's decision because BARCO had not demonstrated that it had performed successfully, as an

entity, on at least three asbestos removal projects. In support of this contention, Mr. Franklin offered the opinion of Mr. Alan Weikert,<sup>1</sup> a State employee and Senior Industrial Hygienist, who stated that team experience in asbestos removal was imperative in assessing a contractor's qualifications to perform similar work.

The fact that another conclusion is possible under these facts does not invalidate the DGS procurement officer's determination of responsibility where the latter also is reasonable. Compare Allied Contractors, Inc., MSBCA 1191, August 16, 1984, p. 16. Here the DGS procurement officer had evidence that BARCO was licensed to perform asbestos removal in Maryland. Additionally, Mr. Harrison had certified that his employees had been trained adequately as to the dangers of the work and applicable regulatory and safety procedures. The DGS procurement officer further had satisfied himself that Mr. Harrison personally had supervised numerous successful asbestos removal projects. Accordingly, since Mr. Harrison was to supervise the captioned project on behalf of BARCO, we cannot say that the DGS procurement officer acted unreasonably in determining Henry Brothers to be a responsible bidder.

For the foregoing reasons, the appeal is denied.

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<sup>1</sup>This opinion was submitted in a letter dated August 8, 1984. Mr. Weikert was not called as a witness and consequently was not subjected to cross examination.

The first part of the report is a summary of the work done during the year. It is followed by a detailed account of the work done during the year, and a list of the publications of the author.

The second part of the report is a detailed account of the work done during the year. It is followed by a list of the publications of the author.

The third part of the report is a list of the publications of the author.

This report was submitted in a letter dated August 10, 1944. It was one of the many reports which were submitted to the committee during the year.